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# INTERNATIONAL JOURNAL OF ETHICS.

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## THE RELATION OF ETHICS TO JURISPRUDENCE.

THE complete separation of these two sciences, Ethics and Jurisprudence, has been insisted upon, not only with marked emphasis, but with some asperity as well, and in many quarters with undisguised contempt for all who may think otherwise. Thus, Jevons insists that "there can be no such things in social matters as abstract rights, absolute principles, indefeasible laws, unalterable rules, or anything of an eternal or inflexible nature."\* And in a similar vein Matthew Arnold professes the following ethical creed: "If it is sound English doctrine that all rights are created by law, and are based on expediency, and are alterable as the public advantage may require, certainly that orthodox doctrine is mine."† And Pollock insists that "he does not see that a jurist is bound to be a moral philosopher more than other men."‡ Such opinions are the popular ones, and the tide has set against any attempt to join together what man has put asunder. Still, we are not satisfied that these writers have spoken the last word upon this subject. While they have emphasized important

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\* "The State in Relation to Labor," p. 6.

† Lilly, "On Right and Wrong," p. 44.

‡ Pollock, "Essays on Jurisprudence and Ethics," p. 23.

distinctions in insisting upon the complete separateness of the two spheres of ethics and jurisprudence, they have, nevertheless, failed to penetrate the deep things of these sciences. We would therefore ally ourselves with the protestants in this regard.

We will attempt, in the first place, to define accurately the proper spheres of the two sciences; secondly, to prove that the genesis of law discloses natural limitations of sovereign power which are ethical in their character; thirdly, to indicate the indirect and impalpable influence of existing ethical sentiment in creating, annulling, and reforming law; and, finally, to examine several contributions to the solution of this problem from the sphere of international law.

The necessity of strict definition should be recognized by the moral as well as the political philosopher. No advantage accrues to either by a confused blending of radical differences. Each must preserve its autonomy. Ethics is not a branch of jurisprudence, nor is jurisprudence a branch of ethics. By an exact differentiation, each science conserves its own force and dignity. And, therefore, ethics influences jurisprudence more by bringing to it life and light from without, than by holding an artificial and false position within the jural sphere.

In order that we may not be charged with begging the question at issue in the definition of our terms, we will take the definitions given by Holland, and which are framed in the spirit of Austin, and the general school of analytical jurists. He defines jurisprudence as "the formal science of positive law, *i.e.*, the general rules of external action, enforced by a sovereign authority."\* And ethics he defines as "the science of those laws of conduct self-recognized as right, and self-imposed by the free choice of the individual."†

Here the antithesis is between a standard imposed by the sovereign power and an ideal recognized by the individual; also, between the outer act which is the content of the one, and the inner motive which is the exponent of the other.

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\* Holland, "Jurisprudence," p. 37.

† *Ibid.*, p. 25.

The one depends upon objective authority for its enforcement, the other seeks as its guarantee a subjective support. In the spirit of these distinctions, we find legal right sharply distinguished from moral right,—the former is a claim enforced by sovereign power; the latter is a claim urged upon another or upon society at large, but incapable of external sanction. Moreover, right both legal and moral has always expressed or implied its correlatives,—legal obligation and moral obligation. Three parties are necessary to the existence of a legal right,—the state, the one in whom the right conferred by the state inheres, and the one subject to the correlative obligation which the state imposes. But as regards a moral right, two parties alone are concerned; the third party, the state, is no longer present, and therefore the moral right cannot be enforced.\* Its force lies alone in the inherent reasonableness of its demands, and has weight only as it appeals to the conscience of one whose moral judgment recognizes its urgency as an evident duty. Inasmuch as the one possessing a moral claim is powerless to enforce it, the emphasis is placed upon the moral duty rather than upon the moral right, so that actually not two persons, but one alone is to be considered in this matter; and he is the one who recognizes the obligation, for he alone can compel action.

In commenting upon the above distinctions and definitions, we observe that law and morality both refer conduct to a standard,—the one imposed by the sovereign power, the other self-recognized as categorical imperative to the individual will. While the two standards are often distinct, there are cases where they are identical. Let us examine the possible combinations that may arise with the variable factors,—legally right, legally wrong, morally right, and morally wrong.

The two spheres of morality and legality may have no single point of contact. Some acts may have legal significance, but have no moral value one way or the other. The well-known law of the road is entirely devoid of any moral bearing whatsoever. And, on the other hand, I may be

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\* On this point, see Merkel's "*Juristische Encyclopaedie*," p. 43.

obligated morally to relieve certain suffering or distress, and yet the deed in question may be wholly without the sphere of law.

We have also the possible cases of conflict, where an action morally right may be legally wrong, or morally wrong and yet legally right. This is seen in the many historical instances where resistance to law has arisen for conscience' sake, *e.g.*, the refusal to submit to the uniformity acts in England regarding worship.

We have instances also of coincidence where an act is both legally and morally right, or else both legally and morally wrong. "Thou shalt do no murder" is law of the land, and law imposed by the individual conscience. One and the same act, or one and the same person, regarded as author of the act, presents a point in which legal and moral lines meet. From one point of view it has ethical relations; from another it has jural. Here, therefore, is common ground. Many writers have been so intent upon emphasizing the differences between the external and internal aspects of the two sciences, that they overlook this important fact, that in some cases the same standard when viewed as objectively posited is law, but when regarded as subjectively manifest is the moral ideal. Thus the ancient distinction between *mala prohibita* and *mala per se* likewise overlooks the case where the two may be exactly coincident. Bentham, in speaking of the relation of private ethics to the art of legislation, says: "The persons whose happiness these two ought to have in view, as also the persons whose conduct they ought to be occupied in directing, are precisely the same. The very acts they ought to be conversant about are even in a great measure the same." \*

Moreover, to emphasize the spheres of ethics and jurisprudence as distinct and separate does not necessitate the negation of all possible relations obtaining between them. Although one science may not be subsumed under the other as species and genus, it does not follow that, while each preserves its proper autonomy, they may not radically influence

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\* "Principles of Morals and Legislation," vol. ii., p. 239.

one another; even as the separation of church and state does not diminish but rather increases the play of mutually helpful influences which must ever radiate from a true church and a just state. The spirit of the age insists upon an exact differentiation of all spheres of investigation.\* It is true that specialization is the inspiration of the *Zeitgeist*, but there is another spirit of investigation which is not antagonistic to the former, but supplements it. It is the spirit which seeks unity amidst diversity, which explores the depths to discover fundamental resemblances corresponding to surface differences, and which seeks an ultimate synthesis amidst the scattered elements of a rigorous analysis. It is the spirit which strives, as Tennyson puts it, "to reach the law within the law." Such a spirit cannot fail to discover a more intimate relation between ethics and jurisprudence. As Bluntschli says:

"We recognize in the scientific distinction of *Politik* and *Ethik* a great and lasting advance which for the first time renders an independent science of *Politik* possible . . . However, Machiavelli, to whom the merit of this distinction shall not be disputed, has through the indiscreet exaggeration of this distinction, even to the complete separation of *Politik* and *Ethik*, weakened the power of the good among mankind, and has greatly stimulated the tyranny of princes, and radically destroyed all political *Praxis*."†

The two sciences have to do with a wonderfully complex net-work of vital social forces, where minute separation is of the nature of dissection. The dead elements may be correctly estimated and classified, but such a process does not present for observation a living organism. This is the case with jurisprudence regarded merely as a systemization of existent laws, and which takes no note of the mode of their becoming, or of the possibilities of their future modification and growth.

Moreover, the application of law to concrete cases must be wholly within the sphere of positive law. Ethics has no place in its interpretation. What is written is written, and must be so adjudged. Positive law applied to attested facts

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\* On this point, see Mackenzie's "Introduction to Social Philosophy," p. 41.

† "Lehre vom modernen Staaten," vol. iii., p. 7. What Bluntschli says of *Politik* would apply with equal force to jurisprudence.

gives the sole method of practical jurisprudence. No ethical factors are to be considered as affecting the results. But, while we may not interpolate ethical factors which will only complicate the problem, still, it is possible that ethical forces may modify the original data of the problem. While law rules supreme in its own sphere, nevertheless its own nature may be susceptible to external influences, some of which are ethical. In early days the patriarch's will was law. Yet the sphere in which that will was operative was not so completely separate, so precisely defined as distinct from all other spheres of activity and interest, that no external forces ever touched the patriarch's head and heart, and so indirectly modified for better or for worse the weal of his little realm. Likewise the sovereign, whether individual or collective, is supreme as positor and executor of law; yet, nevertheless, that sovereignty is not a force operating in a closed sphere, incapable of being influenced by the manifold ethico-social forces which find play about it.

Again, to announce arbitrarily, as do Austin and his school, that right means always a legal right, at once begs the question at issue. It leads to the false inference that all right is originally legal right, and that any other as a moral right must be derived from it; or it ignores the existence of any such thing as a moral right. When Hobbes says that it is nonsense to speak of a law as unjust, he is correct only upon the assumption that unjust is a term co-extensive in meaning with illegal. Even Hobbes acknowledges that a law may be pernicious, though not unjust. If right is always to mean a legal right, though an arbitrary assumption, then it must be adhered to consistently.\* He is most inconsistent and illogical who tacitly infers a moral privilege from the possession of a merely legal right. This fallacy underlies the vast majority of cases where questionable practices in commercial relations exist, and where conduct within the pale of the law seems to be the sole desideratum. Ethics as well as jurisprudence enters a plea for clear and consistent usage of terms. There-

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\* See Green's "Philosophical Works," vol. ii., p. 339.

fore, if right is to be regarded always as legal right, it is illogical in the extreme to add a plus signification which includes a moral right, or to ignore the moral right by a tacit reduction of the moral factor to zero.

Having these distinctions and definitions in mind, we pass to the consideration of the derivation of law. The analytical jurists hold that all law proceeds from sovereignty. Law, with them, is sovereign power enforced by external sanction. Here they would cease all further inquiry. In their "juristic chemistry," as Von Ihering styles it, they discover a resultant element—sovereignty. But as long as any element is capable of a more ultimate analysis, scientific method demands continued investigation until a final analysis is reached. Their position is true from the point of view of formal law. It is true for the lawyer, but it does not satisfy the political philosopher who is forced to subject sovereignty to a closer examination. What is the warrant for the supremacy assumed by a part over the whole of a community or state? Whence did it arise? What is the guarantee of its permanent sway? Is the supreme power without limitations? These and similar questions force themselves upon one who desires a complete account of the matter. The tendency to cease all investigation of origins as soon as sovereignty is reached may be due, partly, to the excessive specialization of to-day, already noted; or partly on account of the disastrous failure of the French in their governmental experiment founded on the doctrine of natural rights, where "liberty, equality, and fraternity" were prostituted to the cause of wrong rather than right, and created license of evil rather than liberty to realize the good. Such a history would naturally discredit all "natural right" doctrines. Or this tendency may be due in some measure to a growing philosophical distaste for all *a priori* postulates in seeking an ultimate basis for law. Whatever the reasons, the tendency is evident.

There is, however, an historical indication of the felt need of some basis for sovereignty, in the many attempts to fortify the bare concept of sovereignty by some form of an original social contract. All these attempts have failed, but they

indicate a natural striving to discover a solid foundation upon which sovereignty might stand. It is significant that Hobbes posits a social contract in behalf of absolutism, and Locke urges the same in defence of a liberal government, and Rousseau, in turn, refers to a social contract by which supreme power is ultimately referred to the general will. The latter has worked its logical result—anarchy. That these widely divergent theories should seek a further explanation of sovereignty, indicates an instinctively felt need in this regard. Although these theories have not given a satisfactory solution, being disproved theoretically by Hume and Burke, and practically by the logic of history, still, it does not follow that no solution is possible. The attempts prove the need of a solution; the failure indicates that the solution lies in another direction. It therefore seems that the question raised as to the further analysis of sovereignty is in the line of a natural, and therefore scientific, method of investigation.

In answer to this question, we insist that sovereignty is limited in this respect, that it is not always the absolute creator of law. As Lieber, in his "Political Ethics," says: "The agents of the state may put a stamp on precious metal, but they cannot create value." The existent material which receives the stamp of law is largely custom. It is irrelevant to our discussion whether the sovereign declares directly certain customs to be law, or indirectly ("obliquely") recognizes judicial decisions based on custom to be law, according to Austin's dictum that whatever the sovereign permits is *ipso facto* commanded. It is sufficient for our purpose to note that laws are often declaratory rather than creative.\* Bacon tersely expresses this thought: "*Regula enim legem, ut acus nautica polos indicat, non statuit.*"† However, on the other hand, Bentham says that "Government fulfils its office by creating rights."‡ But creating may mean the forming out of nothing, or the forming out of pre-existent material. Bentham would have great

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\* See Burke, "Popery Laws," Cap. III., I.

† "Aphorisms," LXXXV.

‡ "Bentham's Works," Bowring's ed., vol. i., p. 301.

difficulty in proving his proposition if he takes the former meaning; and if he takes the latter, the question is still raised as to the nature of this material. The creation of rights refers us back to certain materials. No one can escape the issue. For our purpose the chief interest is this: have these materials out of which the right is created an ethical substratum? Some customs have no ethical significance, but others have, being the expression of the moral convictions of the community, tribe, family, or state. Savigny says:

“Positive law is derived in every community partly from principles common to mankind and partly from the operation of special agencies.”\*

Here Savigny recognizes a constant as well as a variable factor in the genesis of law. The variable is the operation of special agencies, as environment, racial or tribal peculiarities, in short, all that Montesquieu has emphasized as determining forces in the development of a state. The constant factor we find in the principles common to mankind. If these principles, therefore, reveal ultimate ethical elements, law at its source has important ethical relations. Professor T. H. Green affirms:

“The establishment of obligations by law or authoritative custom and the gradual recognition of moral duties have not been separate processes. They have gone on together in the history of man. The growth of the institutions by which more complete equality of rights is gradually secured to a wider range of persons, and of those interests in the various forms of social well-being by which will is moralized, have been related to each other as the outer and inner side of the same spiritual development.”†

Mr. Freeman acknowledges from the historian's stand-point that “there is at present among civilized nations a general agreement as to what is right and wrong in the conduct of an individual man.”‡

And Sohm, from the jurist's point of view, traces law to an “ideal of justice which resides, in the first instance, in the

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\* Savigny, “Private International Law,” p. 6.

† “Philosophical Works,” vol. ii., p. 552.

‡ *Princeton Review*, New Series, vol. ii., pp. 642, 643.

community of a people, and through it in the community of mankind at large, and the ultimate source of which is belief in divine justice." \*

Assuming as proved the existence of ethical elements in certain customs, the question suggests itself, How did these ethical elements originate? They certainly did not proceed from that part of man's nature which Mr. Fiske designates as his "brute inheritance." And yet many writers take this as the meaning of natural law, and they refer to Ulpian's definition, "*Jus naturale est, quod natura omnia animalia docuit: nam jus istud non humani generis proprium sed omnium animalium.*" † Professor Huxley had such a definition in mind, no doubt, in his article on "Natural Rights and Political Rights," ‡ where he insists that it is as reasonable to ascribe a natural right to the ferocity of a tiger as to the so-called rights of man. But the rights of man are not deduced from the tiger part of his nature, nor from the consideration of man merely as a self-seeking individual in the struggle for existence. We must consider the facts not only of the animal but of the ethico-intellectual parts of his nature. The ethical judgments are the deliverances of that part of his nature which differentiate man from the tiger and the ape. Regarding him merely as a more highly organized and more completely equipped animal, his rights are coextensive with his strength and his shrewdness. Such an ultra individualism would lead to anarchy. And such a conclusion Huxley reaches logically, but his premises are at fault. Man's nature is social as well as individual; egoistic appetences are correlated with altruistic. "Man is by nature a political animal." Aristotle's doctrine § puts the doctrine of a right emerging out of nature upon its proper basis. Man, as a member of society, naturally and not artificially related, necessitates the rise of correlated rights and duties. *Ubi societas, jus est.* It is

\* Sohm, "Institutes of Roman Law," p. 14.

† "Just. Inst.," i., 2.

‡ The *Nineteenth Century*, February, 1890.

§ "Pol.," i. 2, paragraph 9.

impossible to think of man isolated from his fellows. He is essentially a gregarious animal. *Unus homo, nullus homo.* The association of man with man necessitates a recognition of mutual rights and obligations, bearing and forbearing, which are natural restrictions upon individual self-seeking.\* Where this recognition is not fully developed, it is seen in the germ. When the innate principles of equity seem to be contradicted by prevalent practices, they may be still found buried beneath passion and appetite. They may be a force that is neutralized, but nevertheless a force, potential though not actual.

It is generally agreed that the beginning of the state is the family. In the family there naturally arises a recognition of rights and obligations obtaining between parent and child, and between children of common parentage, and even between more distantly related members of a clan holding allegiance to a common chief. The natural solidarity of family life would give rise to a balance of egoistic and altruistic principles which would affect the manifold relations of man in the larger world of the tribe, and of the state. Von Ihering † ridicules such a position, declaring that we might as well affirm that nature had endowed the soul of Adam with the concept of a cooking-pot, or a ship, or a steam-engine, as with the concept of right. There is, however, a vast difference between that which is realized in the sphere of experience and that which is the result of experience. The essential point is this: whether the perfected ethical concept is derived from non-ethical elements. Von Ihering overlooks this distinction.

It would be well at this stage of our discussion to distinguish between a legal personality, so called, and a moral personality. The former phrase is used in a technical sense given to it originally through Roman law. The legal person is such by virtue of possessing certain legal rights. It is not necessarily an individual; it may be a corporation, estate, etc. But antecedent to the legal person, both in time and logical

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\* See Professor Green, "Philosophical Works," vol. ii., p. 353.

† "Der Zweck im Recht," ii., 112.

sequence, is the personality which stands for all that man is generically, and out of which rise both rights and obligations. Imagine all law to be annulled; this latter personality would still remain. It is "this personality which gives the capacity for legal rights: it is the foundation from which all abstract formal right arises." \* This is Sterling's position in commenting upon Hegel's system.† If there are rights incident to the relations of man as a member of society, we should expect some consensus of judgments among various races of peoples of the world concerning these rights. The probability is largely against any correspondence in their ideas of right and wrong, unless there be some one determining cause producing such correspondence. And we do find substantial agreement regarding fundamental principles, though codes of law differ in their details. As in philology a common root indicates common origin of words, so in law common principles among widely different nationalities indicate one source whence they spring. Grote, in his "Ethical Fragments," ‡ says:

"The ethical sentiment is natural in the sense of universal, inasmuch as the foundation of it depends upon causes of universal occurrence not peculiar to any one age, or to any one form of society, or to any one particular mode of training. But it is not natural in the sense of simple, uncompounded, an instinctive."

As regards this latter qualification, it seems to be a matter of indifference, for our purpose at least, whether the ethical elements in the common customs be "simple, uncompounded, and instinctive," as the Intuitionist would insist, or occasioned, as Grote holds, by "causes of universal occurrence, and not peculiar to any age, or to any one form of society, or to any one particular mode of training." In either case we arrive at a certain uniformity concerning fundamental ethical principles; the one affirming the uniformity as prior to and shaping experience, the other as the necessary result of experience.

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\* Sterling, "Lectures on the Philosophy of Law," p. 28.

† Professor Green is in full accord with this thought. "Philosophical Works," ii., p. 352.

‡ Page 93.

A constant factor indicates a constant cause, a somewhat that makes for righteousness, an ultimate ethical force, ever influencing and giving color to custom, and thereby modifying the law which emerges from custom and declared by sovereign power.

If, therefore, custom, as a source of law, has a certain uniform ethical content, it will follow that whatever ethical uniformity there may be in the customs of various peoples, that same ethical uniformity will characterize the laws which spring from these customs. And whatever ethical worth a custom may have possessed, the same worth is conserved when the custom is declared to be law. Sovereignty may add sanction, and clothe with dignity, and entail additional responsibility, but it can never alter the nature of that which is essentially right or wrong. To say that a law is unjust, or, as Bentham would insist, pernicious, is equivalent to affirming that the pernicious elements in the pre-existing custom perdure in their essential nature beneath the guise of a sovereign sanction. Lotze remarks, concerning contracts, that "they are, of course, in our real life, placed under the protection of laws, but these laws could not be called upon to protect them unless some worthy moral element lay within the contracts themselves."\*

We would now examine the doctrines of the English and Continental schools of jurisprudence for the purpose of noting certain confirmations, and concessions as well, concerning the proposition which we have advanced. The English school of analytical jurists, already referred to, insist that law as it is limits the entire sphere and scope of jurisprudence. They are not concerned with law as it ought to be. Jurisprudence with them is a system of codification simply, and not the science of general principles. Their study of law has nothing to do with origins; it is the analysis of force, and the power to execute through sanctions. Nevertheless, they acknowledge that while the consideration of law as it ought to be has no place in jurisprudence, still it may

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\* Lotze, "Practical Philosophy," p. 88.

very properly be relegated to the science of legislation. Austin, in criticising Ulpian's definition of law, says :

"Jurisprudence, if it is anything, is the science of law ; but Ulpian's definition embraces not only law, but positive morality, and even the test to which both of these are to be referred. It therefore confuses the science of legislation and deontology." \*

Our purpose is to show that law in some one of its aspects, at least, has ethical relations ; therefore the above concession is significant. It is to us a matter of indifference whether the subject of law as it ought to be is a topic of jurisprudence or of the science of legislation. In either case it holds an important place in the philosophical encyclopædia. Sir Frederick Pollock, in his criticism of Professor Lorimer's "Institutes of Law," acknowledges that these ethical questions may be admissible as belonging to a sort of borderland or penumbra of legal science. So also Sir Henry Maine agrees to the relevancy of these questions in the sphere of the science of legislation, though not in jurisprudence. Indeed, he says that next to a new history of law, what we most require is a new philosophy of law.† Strangely enough, Jevons, while insisting upon the same distinction, interchanges the meaning of the terms legislation and jurisprudence, saying, "There may be a general science of ethics, of economics, of jurisprudence which may assist us in the work of legislation."‡ The point at issue, therefore, seems to be, not the relevancy of ethical considerations, but the proper place to which they shall be referred in the classification of the legal sciences.

A concession of another kind we notice in Austin's "Jurisprudence," where he states that the general rules of morality are laws improperly so called, and yet that the divine commands revealed to man are laws properly so called. But the fact must not be ignored that many rules of morality which Austin disregards totally are themselves coincident with the commands of God ; for God's commands may be known,

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\* Austin, "Jurisprudence," vol. i., p. 223.

† "Early Institutions," p. 342.

‡ "The State in Relation to Labor," p. 9.

not only by external revelation, but by revelation to man through the very constitution of his nature, and appearing in the universal dictates of conscience. For

“The truth in God’s breast  
Lies trace for trace upon ours impressed :  
Though He so bright and we so dim,  
We are made in His image to witness Him.”

Therefore, when Austin acknowledges the influence of the laws of God in giving shape to the laws of the state, he must concede also a certain relation between the laws of the state and the rules of positive morality so far forth as the latter have universal recognition and worth.

Let us now examine briefly the Continental school of Jurists which divides into two, the philosophical and the historical. There is a tendency towards a union of the two—as constituting a truly scientific method.\* The former school of jurisprudence traces law to an ultimate *a priori* source. And the disciples of this school avowedly profess a belief in some form of *Naturrecht* as the fundamental basis of law. They are the special targets for criticism and ridicule. And yet they merit a respectful hearing. For the idea of *Naturrecht* is the central idea of German jurisprudence. And the German philosophy cannot certainly be charged with a superficial view of things. This school holds a doctrine diametrically opposed to that of Austin and his followers. They seek an ultimate basis of right prior to sovereignty. The stream must be traced to a source above the point of positive law. Their method is to deduce the actual from the ideal, or, to quote from Trendelenburg, “to deduce the multiplicity of rights from the self-same fount, that they may be exhibited as governed by the unity of an inherent co-ordinating thought.” We find in the “Introduction to the Metaphysic of Law” a statement of Kant’s that may be fittingly opposed to the attempt to discredit all *a priori* considerations relative to the principles of jurisprudence :

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\* See Bluntschli, “Theory of the State,” p. 70.

"What the law in any instance is the jurisconsult can easily tell, but whether it is RIGHT or JUST that it should be so, is what he wants a criterion to determine. But this criterion can only then be found when, abandoning all *a posteriori* principles, he ascends to the sources of reason, and discovers on what all legislation whatsoever can alone be based; in which analysis positive law is doubtless a great help and guide. But laws founded singly on experience are like the mask in the fable—beautiful but hollow." \*

The analytical school, however, has received its most searching criticism from the historical school, whose founders are Savigny and Puchta. Their main contention is that the essence of law is not command, that force is not its main nor characteristic feature. They insist that law is a natural growth, being at its various stages the reflex of the common consciousness of the people, and therefore its formation is similar to that of language. Such a position emphatically indicates a process anterior to the command of sovereignty. It is the working of silent forces, the slow but sure growing of the power of truth and of justice in the thoughts and customs of man. For, by a mere process of analysis through simple abstraction, the English school reach the concept, *sovereignty*, stripped of all its attributes save that of force, but in so doing they lose sight of all other attributes. As Sir Henry Maine says:

"They neglect the vast mass of influences which we may call, for shortness, moral, and which perpetually shapes, limits, or forbids the actual direction of the forces of society by its sovereign. . . . Just as it is possible to forget the existence of friction in nature, and the reality of other motives in society except the desire to grow rich, so the pupil of Austin may be tempted to forget that there is more in actual sovereignty than force, and more in laws which are commands of sovereigns than can be got out of them by merely considering them as regulated force. . . . A despot with a disturbed brain is the sole conceivable example of such sovereignty." †

Moreover, there have been a number of organized political societies in the history of mankind, where force as an element of law has been entirely absent, or has been present in a minimum degree. In the Irish courts in early days, the institu-

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\* Kant, "Metaphysics of Ethics," Third Edition, p. 178.

† "Early Institutions," pp. 359 and 361.

tions which stood in the place of justice exercised jurisdiction only through the voluntary submission of intending litigants. Spencer, in "The Man *versus* The State," \* instances a number of tribes governed by customs without any sanction whatever to enforce them. In Iceland, in the tenth and eleventh centuries, the so-called courts of law had no coercive power whatever. Sir Henry Maine also cites † several examples of kingdoms in India ruled by a sovereign, and yet with no appeal to force.

Again, Von Ihering ‡ acknowledges that while the essence of law is force, yet it does not reach the highest stage in law until the sovereign is obligated as well as the subject. This he calls a bilateral obligation, the special subjugation of the state power to the laws issued by it. This implies a dominion of right and of law superior to the command of the sovereign. He gives us, too, the proper relation which should obtain between right and might in the following beautiful simile :

"Justice, which in one hand holds the scales in which she weighs the right, carries in the other the sword with which she executes it. The sword without the scales is brute force ; the scales without the sword is the impotence of law. The scales and the sword belong together, and the state of the law is perfect only when the power with which justice carries the sword is equalled by the skill with which she holds the scales." §

With these authorities as allies, we would fortify our position that the analytical school are but partial in their analysis and process of abstraction, and are at variance with the facts of history as well as the deductions of a sound philosophy. They overlook the fact that the "Thou shalt" of the sovereign derives its peculiar force from the "I ought" in the heart of the subject. The majority keep the law out of reverence for the law. They overlook the evident truth which Lowell expresses :

"Before man made us citizens,  
Great Nature made us men."

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\* Pp. 90, 91.

† "Der Zweck im Recht," p. 344.

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‡ "Early Institutions," chap. ii.

§ "The Struggle for Law," p. 2.

Is it possible to discover any cause which would naturally lead the English jurists to emphasize the command of sovereignty as sole essence of law? There is in English history an evident "*Tendenz*" towards unlimited sovereignty, growing out of the absolutism of the seventeenth and eighteenth centuries. Cromwell and Puritanism were a protest against this; in America the assertion of "inalienable rights" as a declaration of independence was itself a protest against this same absolutism. And to-day the fact that writers of the analytical school sneer at the bare suggestion of "inalienable rights," is more than a mere coincidence. It is the logic of history.

There is another law source, namely, equity. We wish to prove that the very existence of such a concept as that of equity, lying side by side in thought with the concept of law, implies a relation between the two which is of the nature of a contrast. Law as it is is confronted by law as it ought to be. This indicates that there has been a felt need in the minds of men that the former should be supplemented by the latter.

The two historical illustrations of the influence of equity upon law are: the edicts of the Roman prætor and the decisions of the Court of Chancery in England.

The special function of the Roman prætor was, originally, to interpret the existing law, the *jus civile*; the executive power was also in his hands. Later, the office was divided into two separate functions, vested in two different prætors,—the *prætor urbanus* and the *prætor peregrinus*. The latter was concerned with the adjudication of cases in which foreign residents in Rome, or foreigners *in transitu*, were litigants. At once a difficulty arose: a foreigner could not claim legal rights under Roman law, and a Roman could not be obligated by foreign law. Two foreigners could not be tried by the law of the land of either, or by the Roman law. In all such cases purely positive law was not available; the parties in question had no legal status. The prætor peregrinus, therefore, adjudged all such cases according to his own judgment as to the facts and circumstances at issue. Later, it became necessary to have some system, some common principle of reference. Accordingly, the prætors sought to formulate the principles

of law which were found in the several codes in the various foreign states. Such an induction expressed the common content of the customs of all the Italian States and other foreign powers. This gave a mass of legal principles founded upon customs that were freed from all local and temporal coloring, and, therefore, presenting features of a universal character.

Furthermore, through the influence largely of the Stoic philosophy, the Roman jurists maintained that such a system of principles common to all tribes and peoples, namely, the *jus gentium*, could have but one origin, viz., in the nature and constitution of man as a member of society. This interpretation of prætorian edicts gave them a dignity which they had not before possessed, and they in turn modified the interpretation and application of the *jus civile*, the law applicable to Roman citizens only. Later, the prætorian edicts attained a dignity and validity superior to the *jus civile*. Finally, the two were absorbed into one system of law and codified under Justinian in the *Corpus Juris Civilis*.

Sohm says:

"What was so entirely unique in the achievements of Roman law was simply and solely its masterly treatment of the casuistry of private law,—a treatment which, while discovering the laws of a particular case, revealed, at the same time, both the elements of the case and the principles inherent in these elements, . . . a treatment which had solved the great problem how to reconcile a free equitable discretion with fixed rules, the vindication of the concrete individual intention with the necessary subjection to its immutable, innate law."\*

We see in this quotation that Rome's contribution to the historical development of law was something of an "immutable and innate" character, such as Professor Jevons and Sir Frederick Pollock so strenuously exclude from the domain of law proper.

So, also, Morey, in his work on Roman law, declares that the *Corpus Juris Civilis* was the product of a universal system of rights founded upon principles of natural equity.†

Moreover, the legislation of Justinian has affected the juris-

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\* Sohm, "Institutes of Roman Law," p. 96.

† Morey, "Roman Law," p. 163.

prudence of all subsequent time, for it was in this form, according to Savigny and Sir Henry Maine, that the Roman law became the common law of Europe. The old *jus gentium*, formulating universal and ultimate rights and obligations, influences directly law as it is to-day. We find this ethical stream taking its rise in the heights of history when the world was young, mingling its currents with another historical stream, that of jurisprudence, whose flow is across the centuries.

Lotze has admirably expressed the same thought :

"It is to be regarded as an historical benefit that the modern world has inherited the Roman science of right. . . . It is not the single proposition about rights, but the science of rights which it produced (and especially in high perfection with respect to private justice) that has been of advantage for the discovery, even under wholly new relations of life, of a justice which corresponded with the nature of these relations themselves, and which was independent of temporary presuppositions of the then prevalent religious and social sentiments." \*

In like manner there grew up in England a court of equity, where the lord chancellor, the "Keeper of the King's Conscience," decided cases according to the broad principles of an equitable jurisprudence. By means of injunctions the ordinary procedure of the common law courts was discontinued when it seemed to be working injustice, and a transfer was effected to the equity court. Like the prætorian edicts, the decisions of the lord chancellors became more and more definitely systematized, and at length became incorporated in the statute law of England under the Judicature Act of 1873. It often occurs in England, and America as well, that a given case has no guiding precedent or relevant statute; then the judge's decision must be based upon his individual conception of justice and equity.†

It has been declared judicially that "justice, moral fitness, and public conscience, when applied to a new subject, make common law without precedent."‡ In Judge Rick's decision

\* Lotze, "Practical Philosophy," p. 130.

† See Holland, "Jurisprudence," p. 57.

‡ *Millar v. Taylor*, 4 Burr, 2312, cited by Sir James Stephen in 3 "Hist. Criminal Law," p. 359.

in the Ann Arbor case, where the Lake Shore Railroad engineers and firemen refused to handle Ann Arbor freight, the following is reported in the *New York Tribune*, April 4, 1893: "Let us apply the general principles of equity which are consistent with every rule of natural law and justice to the facts in the case."

From all this, we draw the following conclusions: the existence of equity courts indicates that there are certain claims of justice which are either opposed to existent law or upon which the law does not touch. Also, the fact of decisions based directly upon right and justice as generally recognized, where there is no precedent, signifies a direct appeal to a universal law which certainly possesses some ethical features. And the fact of equity decisions being incorporated into statute law itself, indicates a transfer of inherently ethical principles into the body of positive law.

We come now to legislation as a source of law. We will indicate two ways in which ethics puts a check upon unlimited legislation: where legislation violates an innate sense of justice on the one hand, and, on the other, where it opposes a legal sanction to duties which should be relegated to the sphere of the individual conscience. The legislator's standpoint is naturally a utilitarian one, looking to the greatest happiness of the greatest number. Yet, as Pollock acknowledges, "A public judgment of happiness, expediency, well-being, or whatever else we call it, is, in the nature of human affairs, a rough thing at best."\* It needs at all times the controlling influence of established principles. It may not lightly set aside rights that have been generally recognized and felt to be innate. The sphere of rights acknowledged by the state has been growing steadily throughout all history. The limits upon sovereign legislation are Teutonic in their origin. As Montesquieu says: "The germs of parliamentary constitutions are to be found in the forests of Germany." This Teutonic spirit has ever opposed the inalienable rights of personality to the unlimited sway of despotic power. There

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\* Pollock, "History of the Science of Politics," p. 41.

has also been a decided protest against paternal government, and the police control of duties which should naturally be left to the free choice of the individual. Ethics here enters a plea for the inviolability of its distinctive sphere. Spencer has valiantly championed this cause against Huxley. The two represent extreme positions, but there is a proper mean between them. A harmonious adjustment will ensue when ethical considerations are allowed at least a respectful hearing in matters of legislation. Legislation is not to usurp the functions of morality, but merely to render possible the conditions under which morality may flourish. Therefore, while *jus* may not be the supreme end of the state, nor the end be considered as alone the legal guarantee of individual freedom, still, these conditions shall not be violated in pursuing as an end public welfare or public safety.

We find that law is extremely sensitive to prevailing public opinion. The historical school has emphasized this. A dead-letter law is a law minus this popular sentiment. This sentiment is not always ethical; but when it is, it is the mightiest force that can move upon the face of society. No law can survive the determined protest of an aroused public, for law, as Savigny puts it, "has its roots in the common consciousness of a nation." \* Von Ihering, in his "Struggle for Law," calls attention to the fact that progress in law is attained by a continual conflict between positive law and a feeling of right (*Rechtsgefühl*).† The latter is ever urging law reform. But whenever Von Ihering speaks of rights, he is scrupulously careful to qualify the term by the adjective legal, always using the phrase "legal rights." Yet legal is frequently used by him in the sense of that which ought to be legal rather than that which positive law declares. In one place he speaks of the disastrous influence which "unjust laws" and "bad legal institutions" exercise on the moral power of the nation. And he adds that in the "feeling of legal right" the nation possesses the most fruitful source of its strength. Now, it is

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\* Savigny, "Private International Law," p. 370.

† "Struggle for Law," p. 11.

impossible that there should be any antithesis between legal right and law. Hobbes will stand surety for the truth of this statement. Von Ihering, therefore, must mean by legal right that which *ought* to be legal. It is a right, ideally conceived, which law ought to recognize. This is equivalent to an ethical force stimulating legislation. This he acknowledges in the closing paragraph of his work: "Ethics has to tell us what is in harmony with and what contradicts the idea of law."\* The idea of law is higher than law. It was the idea of law which incited the barons to demand the Magna Charta at the hands of John. Though its various clauses are found in earlier decrees, yet as positive law they were dead. To revive them had the force of creation anew. That which animated the barons could not have been the dead laws, for they had no life-giving force, but the idea of law in which would be comprehended their instinctively felt rights. It was the idea that the dead law ought to be made alive. It was the idea of law which stimulated the demand for the Petition of Rights in 1628, the Bill of Rights in 1688, the Declaration of Independence in 1776, the Constitution of the United States in 1787, and the Reform Bill of 1832. Whether the idea of vested rights which the sovereign had ignored, or the idea of a natural right never before acknowledged by the sovereign, it was still an idea,—an idea, too, whose force was largely ethical, and whose realization was due to the strength of an ethical sentiment deep-rooted in the heart of humanity, which neither lords temporal nor lords spiritual, neither crown nor Parliament, could withstand.

Antigone's reply to Kreon is an appeal to this feeling of right as opposed to the tyranny of the king:

"It was not Zeus who heralded these words,  
Nor Justice, helpmeet of the gods below.  
'Twas they who ratified those other laws,  
And set their record in the human heart.  
Nor do I deem thy heraldings so mighty  
That thou, a mortal man, couldst trample on  
The unwritten and unchanging laws of Heaven.

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\* "Struggle for Law," p. 129.

They are not of to-day or yesterday,  
 But ever live, and no one knows their birth-tide.  
 These, for the dread of any human anger,  
 I was not minded to annul, and so  
 Incur the punishment that heaven exacts." \*

We come now to the final portion of this discussion, the relation of ethics to international law. International law has been called the "vanishing point of jurisprudence." That which is true in mathematical relations may obtain here, namely, that in limiting cases there are revealed important facts which in approaching the limits escape observation. The point of view of international law presents law without any sanction whatever. The parties are all sovereign. There is no superior, and therefore no positive law is possible. The appeal in all controversy must be to generally recognized principles of justice and equity.

The history of international law shows its origin in Roman law. A part is derived from treaties and precedents; but over and above this is a considerable remainder called by Vattel the "necessary law of nations." This corresponds to the *jus gentium* of Roman law.

The Greek state recognized certain mutual obligations,† and the Romans adhered to certain formulæ in declaring war, as indicated in their *jus feciale*; and during the Middle Ages the papacy at times exercised international authority; also the Holy Roman Emperor appeared as international arbitrator; and certain rules regarding international trade existed in maritime codes, as the "Consolato del Mare," and the laws of Oléron, of Wisbuy, and of the Hanseatic Towns. Nevertheless, international law received its systematized form originally in the work of Grotius. And Grotius himself was versed in Roman law and imbued with its spirit. The chief idea of Roman law in his writings, and of the publicists after him, was that of the *jus gentium*. While the Romans had not conceived of the *jus gentium* as applying to the relation between independent

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\* "Antigone," V., 448-458. Translation by Dr. Donaldson.

† See Morey, "Roman Law," pp. 207, 208.

states, it was nevertheless so interpreted by all early writers on international law.

International law relative to treaties also was founded largely upon the Roman law of contracts, which were derived largely from the *jus gentium*, and were liberally interpreted according to the principles of national equity. We find therefore that international law is largely derived from the *jus gentium* of Roman law, which in turn expressed the common sentiment of mankind in reference to the principles of justice and right.

Also, where there are no treaty rights and no precedents, disputes between nations are often arbitrated by appeal to the principles of national equity. This was urged by Mr. Carter, the United States counsel before the Behring Sea Commission at Paris, and in opposition to the proposition of England's counsel, Sir Charles Russell, who insisted that international law is for all practical purposes a code, and ethics and equity have nothing to do with it.

The common ideas of equity and justice have been applied in recent years to the control and governing power of an immense territory, in which were found 42,608,000 people in 1885, namely, the government of the Congo Free State. This had its rise in the Berlin Conference of 1885. The African International Association had obtained through treaties with four hundred and fifty independent African chiefs rights of sovereignty. This ceded sovereign power rules over a large complex whole composed of small sovereign principalities. The right to make any such cession of sovereignty is confirmed by the opinions of Sir Francis Twiss, of England, and Professor Arntz, the Belgian publicist. The International African Association was first recognized as a government by the United States on April 10, 1884. And in the Berlin Conference of 1884-85 it received formal recognition as the Congo Free State from all the European powers.\* A nation was thus born in a day. It came into existence not by conquest, nor hereditary right, but by the sufferance of the great

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\* Stanley's "Congo," vol. ii., p. 380.

powers of the world; or, as it was put by one of the presiding officers of the Conference, "The new state owes its birth to the generous aspirations and enlightened initiative of a Prince (*i. e.*, King of the Belgians) respected throughout Europe. It has been devoted from its cradle to the practice of every liberty." \*

At the Conference, the avowed policy of the new-born government was indicated as that of the free exercise of all rights of all peoples throughout the length and breadth of that territory. Africans, Germans, English, and Belgians were put upon a footing of equality. Commercial intercourse, rights of water-way, state protection of property and person, were placed upon the broad basis of justice and equity. We behold a nation without a history, without precedents, without traditions, its laws ready-made, and these laws of such a nature that they met with the approval of the great powers of the world, because they represented that which was common to all these several governments. In cases of difficulties arising between the powers regarding Congo matters, they agreed to appeal to the International Congo Commission, which is substantially an International Court of Arbitration. Moreover, the Congo State seeks to establish a higher standard of individual conduct, the abolition of the slave-trade in Africa, the decrease of intemperance, etc. It is a state dedicated to the noble task of developing an ideal citizenship. It is a unique instance in history. It indicates how thoroughly ethical ideas have permeated public policy. It is an index of the common consciousness of nations regarding the claims of justice. One hundred years ago such an undertaking would have been impossible. The time has come in the history of mankind when it is generally recognized that a state possesses certain moral responsibilities. There is a civic as well as an individual conscience. Napoleon could not say to-day, "With the armies of France at my back, I shall be always in the right." The prophecy of the Grand Duke of Weimar concerning Napoleon's empire is more consonant with inter-

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\* Stanley's "Congo," vol. ii., p. 423.

national sentiment: "It is unjust; it cannot last." Nor could Charles Augustus of Sweden to-day declare, as he did when he broke the truce of Roskild, "There is always just cause of war as soon as there is found a realm incapable of resisting."

There has been a marked ethical progress in international relations. A national altruism has been developed, to this extent at least, that the claims of another nation are regarded with due consideration whenever founded upon truth and justice. As in private ethics a healthy altruism is corrective of a false egoism, so national altruism should supplement and check a governmental policy of short-sighted egoism. International law, with its common restrictions and concessions, has at least partly realized such an ideal, and it in turn has influenced the spirit of all law. Law is becoming more akin to equity. Punishment is becoming more humane. It has become reformatory as well as penal, in which conception the state has in view an enlarged ethical end, not only the greater good of society, but also the realization of good instead of evil in the criminal as well. Courts of arbitration are settling international disputes rather than the arbitrament of war. Might is no longer synonymous with right. There is a progressive movement in all law, national and international, and the progress is along ethical lines, and it is towards the recognition of a solidarity of mankind, towards that reign of law which is justice and which is peace. After all, Burke's fancy of an ideal state may not be merely a passing dream, but a fact manifoldly realized:

"The state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence, because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science, a partnership in all art, a partnership in every virtue and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society, linking the lower with the higher natures, connecting the visible and the invisible world according to a fixed com-

pact sanctioned by the inviolable oath which holds all physical and all moral natures each in their appointed place." \*

JOHN GRIER HIBBEN.

PRINCETON COLLEGE.

## MORAL SCIENCE AND THE MORAL LIFE.†

WHAT is the relation between Ethics and Morals? This is a question which Ethical Societies are naturally led to ask themselves. When a society is described as an Ethical Society, or as a Society for Ethical Culture, does this mean that such a society intends to study the Science of Ethics, or does it mean rather that it seeks to advance the moral life? Or does it mean both these things? Are these two things naturally connected, or are they not? This is an important question. Different Ethical Societies seem to be answering it in different ways; and, unless some agreement is come to with regard to it, there may be a split in the ethical movement.

I suppose an Ethical Society would most naturally be understood to mean a society for the study of ethical science; and this seems to be the interpretation which some of the English Societies have put upon the term. On the other hand, the American Societies for Ethical Culture appear to be much more distinctly practical in their aims. They seek to improve men's practice much more than to advance their theories. This aim would seem to be more naturally expressed by the term "moral" than by the term "ethical;" unless the Greek word is understood simply as expressing a wider conception of moral life than the Latin one suggests—as including the larger social relations as well as the more purely individual aspects of morality. However this may be, it seems clear that there are, *primâ facie*, two distinct conceptions of the aim of an ethical society; and what I wish now to ask is—How

\* Edmund Burke, "Reflections on the Revolution in France." Clarendon Press, Select Works, edited by Payne, vol. ii., pp. 113, 114.

† Read before the Ethical Congress and Convention of Ethical Societies at Chicago, October 1, 1893.